

Simmesport, La.; and charging that it was adulterated in that it consisted wholly or in part of a decomposed substance.

On June 4, 1940, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

578. Adulteration of haddock fillets. U. S. v. 28 Boxes of Haddock Fillets. Default decree of condemnation and destruction. (F. D. C. No. 1469. Sample No. 86925-D.)

On February 9, 1940, the United States attorney for the District of Massachusetts filed a libel against 28 boxes, each containing 15 pounds, of small haddock fillets at Boston, Mass., alleging that the article had been shipped in interstate commerce on or about February 1, 1940, by F. J. O'Hara & Sons, Inc., from Portland, Maine; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance.

On May 13, 1940, F. J. O'Hara & Sons, Inc., the intervenor, having withdrawn its claim, judgment of condemnation was entered and the product was ordered destroyed.

579. Adulteration of frozen halibut. U. S. v. 1,307 Pounds of Frozen Fish. Default decree of condemnation and destruction. (F. D. C. No. 1759. Sample No. 13425-E.)

On April 4, 1940, the United States attorney for the Western District of Washington filed a libel against 1,307 pounds of frozen halibut at Seattle, Wash., alleging that the article had been shipped in interstate commerce on or about March 22, 1940, by the Artificial Ice & Cold Storage Co. from Billings, Mont.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance.

On May 9, 1940, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

580. Adulteration of canned mackerel. U. S. v. 550 Cases of Canned Mackerel. Consent decree of condemnation. Product released to claimant under bond for segregation of the bad mackerel from the good. (F. D. C. No. 1102. Sample Nos. 58301-D, 82516-D.)

On December 1, 1939, the United States attorney for the Eastern District of South Carolina filed a libel against 550 cases of canned mackerel at Charleston, S. C., alleging that the article had been shipped in interstate commerce on or about October 17, 1939, by Hamilton & Co. from Los Angeles, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: "Calho Brand California Mackerel * * * Hamilton & Company, Los Angeles, California, Distributors."

On January 30, 1940, the P. B. Smith Co., Charleston, S. C., having admitted the allegations of the libel, judgment of condemnation was entered, and the product was ordered released under bond conditioned that it be segregated according to codes, and that those codes found to contain decomposed mackerel be destroyed.

581. Alleged adulteration of canned herring roe. U. S. v. 896, 238, and 250 Cases of Herring Roe. Tried to the court. Judgment for claimant; product ordered released. (F. D. C. No. 319. Sample Nos. 47565-D, 47566-D, 47567-D.)

This seizure was instituted on the charge that parts of stomachs and intestines of fish which were found in samples of the roe constituted filth.

On July 29, 1939, the United States attorney for the Eastern District of Virginia, filed a libel against 1,384 cases, each containing 48 cans, of herring roe at Richmond, Va., alleging that the article had been shipped in interstate commerce in various shipments on or about May 6, 13, 15, and 20, 1939, by the Sherwood Fish Products Co. from Sherwood, Md.; and charging that it was adulterated in that it consisted in whole or in part of a filthy substance. The article was labeled in part: (Cans) "Tidewater * * * Herring Roe Distributed by Taylor & Sledd, Inc., Richmond, Va."; or "Pocahontas * * * Herring Roe Packed for H. P. Taylor, Jr., Sole Distributor, Richmond, Va."

On September 21, 1939, the Sherwood Fish Products Corporation, claimant, having petitioned for samples of the seized goods and having filed a motion for a bill of particulars, the court granted such petition and motion and extended the time for filing an answer pending examination of the samples and the furnishing of the bill of particulars. On November 20, 1939, the

United States attorney filed a bill of particulars alleging that the article was adulterated in that it consisted in whole or in part of a filthy substance, i. e., that representative samples of the fish examined contained portions of the stomach and intestines of the fish adhering to and mixed with the roe, and that in a number of the cans the contents were sour and decomposed.

On December 1, 1939, the claimant filed its answer denying that the product or any part thereof consisted in whole or in part of a filthy substance, or was decomposed or sour or in any way unfit for human consumption. On January 18, 1940, a jury having been waived, the case was submitted to the court for decision. Evidence was introduced on behalf of the Government and claimant, and on January 19, 1940, the case was argued by counsel. On January 23, 1940, the court made the following findings of fact and conclusions of law:

POLLARD, *Judge*. "The United States filed its libel in this case seeking the condemnation under the Federal Food, Drug, and Cosmetic Act (Title 21, Section 331, et seq., U. S. C. A.) of 1,374 [1384] cases of herring roe shipped by Sherwood Fish Products Corporation from Sherwood in the State of Maryland into the State of Virginia, to Taylor & Sledd, Inc., at Richmond. By stipulation a trial by jury was waived. From the evidence, I make the following findings of fact:

"1. The libel for condemnation was filed July 29, 1939, and attachment and monition were filed August 1, 1939. In obedience to said attachment and monition the United States marshal for the Eastern District of Virginia seized 474 cases, each containing 48 cans, of an article labeled in part 'Tidewater Genuine Fresh River Herring Roe'; 172 cases, each containing 48 cans, of an article labeled in part, 'Pocahontas Genuine Fresh River Herring Roe'; and 249 cases, each containing 48 cans, of an article labeled in part, 'Tidewater Genuine Fresh River Herring Roe.'

"2. The articles so seized were shipped in interstate commerce from the State of Maryland into the State of Virginia, and at the time of seizure said articles were within the jurisdiction of this court.

"3. The herring roe seized is the property of Sherwood Fish Products Corporation by whom it was packed in the spring of 1939. It constituted part of a pack of 3,085 cases, each case containing 48 8-ounce cans. Out of said pack of 3,085 cases, there had been distributed to the consuming public before the seizure, 2,190 cases, or 105,120 cans, leaving the 895 cases which were seized, the value of which was \$3 per case, or \$2,685.

"4. Sherwood Fish Products Corporation has been engaged in the business of packing herring roe for 34 years and the occasion of the complaint made in this case is the first time that any complaint of any character has come to the knowledge of said company either from the Federal or State Governments or the public as to the quality of any of the herring roe packed by it during all of said 34 years.

"5. In the process of packing herring roe, Sherwood Fish Products Corporation pursues the following course of action: The herring are promptly brought after their capture to the packing houses where they are scaled, the heads cut off, the entrails and roe sacks withdrawn from the body of the fish. The sacks of roe are then placed in pails and taken to another part of the plant where they are thoroughly washed and diligent effort is made by picking with the hand to remove from the roe sacks any particles of viscera which may have adhered to the roe sacks when the latter were removed from the fish. The roe sacks are then placed in cans and subjected to a degree of heat sufficiently high to sterilize the product.

"6. It is impractical, if not impossible, to pack herring roe in large quantities without including in some of the cans particles of the viscera of the fish. The United States has not promulgated any regulations as to the packing of herring roe, nor has it established as authorized by statute, a standard of tolerance as a basis for condemnation of fish roe containing viscera of the fish.

"7. The chemists for the United States examined 168 cans of herring roe, of which number 144 cans were obtained from the lot by the United States before the seizure and 24 cans were taken from the lot seized. The chemist for the claimant examined 7 cans taken from the seized lot. These examinations disclosed the presence of particles of viscera in approximately 50 percent of the cans examined. The maximum number of pieces of viscera contained in any can was 6. In many cans there was no viscera at all. In cans containing viscera, the average number of pieces was 2. In only 1 of the 175 cans examined was there any sign of decomposed roe, and in that one, only 8.3 percent of the 8-ounce can was decomposed. One nematode, or small threadlike worm, was found in each of

2 cans. There was no evidence of decomposition or worms in any of the post-seized cans and none of such cans were sour.

"8. While there was testimony of the physiological fact that the intestinal tracts and stomachs of fish contain partly digested food and excrement, there was no evidence that the particles of viscera in the cans of herring roe which were examined by the witnesses contained excreta or fecal matter. The particles of viscera found in the cans were not unfit for human consumption nor were such particles injurious to the health of the consuming public.

"9. The contention of the United States in this case is—and its witnesses, all of whom are in the employ of the United States, so testify—that particles of viscera adhering to and mixed with fish roe, create a condition calculated to offend the aesthetic senses of the consuming public. No witness from the consuming public was introduced to testify that such a condition would be offensive to him or that in his opinion it would be offensive to the consuming public.

"The Federal Food, Drug, and Cosmetic Act (Title 21, Section 301 [331] et seq., U.S.C.A.) prohibits the introduction into interstate commerce of any food which is adulterated or misbranded. There is no charge that the seized fish roe was misbranded, and its condemnation is sought solely on the ground that it is adulterated under the provisions of Section 342 (a) (3). It is there provided that a food shall be deemed to be adulterated '* * * if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *'. The United States concedes that the fish roe in question contained no putrid substance, and the evidence shows that none of the post-seizure samples of fish roe contained any decomposed matter. Neither is it claimed that the fish roe is injurious to the health of the consuming public. The contention of the United States as set forth in its bill of particulars is that the fish roe 'consists of a filthy substance in that it contains portions of the stomach and intestines of fish adhering to and mixed with the roe.' There is no allegation or evidence that such viscera was unclean or contained any excreta of the fish or that it was filthy on account of its physical condition. Indeed, it is conceded that it was given the same cleansing and heating process as was given to the roe itself. The sole contention of the United States is that viscera of itself and regardless of its physical condition is inherently offensive to the aesthetic senses of the consuming public and that fish roe which contains viscera is therefore filthy within the meaning of the statute. With this contention I cannot agree.

"In order to sustain the contention of the United States, the court would have to write into the statute a prerequisite to condemnation which the statute as passed by Congress does not contain. The act permits the condemnation of a food if it contains any filthy, putrid, or decomposed substance. The court is asked to hold that a food is adulterated and may be condemned if it is offensive to the aesthetic senses. Under no rule of construction known to the court can this be done. But even if the law provided for the condemnation of a food containing an offensive substance, there is no evidence before the court that the fish roe sought to be condemned is offensive to the consuming public. The employees of the United States testify that such is a fact, but the United States fails to produce a single witness from the consuming public to so testify. As a matter of fact it appears in the evidence that Sherwood Fish Products Corporation has been canning fish roe in large quantities for many years in identically the same method without a single complaint from the consuming public. Nor can the court take judicial knowledge that fish roe containing particles of clean viscera of the fish is inherently offensive to the consuming public. Food which is offensive to one person may be deemed by another to be highly delectable. The court knows that the viscera of certain animals, such as tripe and chitterlings, is not only in general use as a food but is greatly relished by epicures. The evidence shows and the court knows as a matter of common knowledge that it is impractical, if not impossible, to can fish roe in large quantities without including particles of the viscera of the fish with the roe. The United States has not established, as it has a right to do under Section 341 of the Act, a standard of tolerance as a basis for the condemnation of fish roe containing viscera of fish, and it is conceded that several particles of viscera in some of the cans would not be deemed objectionable. If it be admitted that a food may be condemned which is not injurious to the health of the consuming public but is merely offensive to the aesthetic senses, the duty rests on the United States to make

out a case for condemnation by clear and satisfactory evidence. A mere preponderance of the evidence is not sufficient. *Van Camp Sea Food Co., Inc. v. United States*, 82 F. (2d) 365 (C.C.A. 3). This burden, in the opinion of the court, has not been carried.

"Conclusions of Law. My conclusion of law is that the seized herring roe is not adulterated as charged in the libel and bill of particulars filed by the United States and that said libel should be dismissed.

"An order in accordance with the views herein expressed may be presented after notice."

On January 23, 1940, judgment was entered ordering that the product be released to the claimant. On motion of the United States attorney execution was stayed and on February 5, 1940, further stay was ordered. On March 13, 1940, the court ordered that the stay of execution be set aside.

582. Adulteration of oysters. U. S. v. 480 Tins and 1,440 Tins of Oysters. Default decree of condemnation and destruction. (F. D. C. No. 1692. Sample Nos. 3581-E, 3582-E.)

This product contained added water.

On March 23, 1940, the United States attorney for the Western District of Pennsylvania filed a libel against 1,920 tins of oysters at Altoona, Pa., alleging that the article had been shipped in interstate commerce on or about March 18, 1940, by Carol Dryden & Co. from Crisfield, Md.; and charging that it was adulterated. It was labeled in part: "Pride of the Chesapeake Oysters."

It was alleged to be adulterated in that water had been substituted wholly or in part therefor and had been added thereto or mixed or packed therewith so as to increase its bulk or weight, to reduce its quality or strength, or to make it appear better or of greater value than it was.

On April 10, 1940, no claimant having appeared, judgment of condemnation was entered and it was ordered that the product be destroyed.

583. Adulteration of frozen oysters. U. S. v. 9 Cups and 180 Cases of Oysters. Default decrees of condemnation and destruction. (F. D. C. No. 1861. Sample Nos. 7423-E to 7433-E, incl.)

This product was in interstate commerce at the time of examination and was found to be discolored and to show evidence of decomposition at that time.

On April 23, 1940, the United States attorney for the Southern District of California filed libels against 9 cups, and 180 cases each containing 12 cups, of frozen oysters at Los Angeles, Calif., alleging that the article had been shipped in interstate commerce on or about October 11 and November 2, 1937, by the Glacier Bay Oyster Co. from Seattle, Wash.; and charging that it was adulterated in that it contained a filthy, putrid, or decomposed substance. The article was labeled in part: "Sea-Kold Fresh Oysters."

On May 15, 1940, no claimant having appeared, judgments of condemnation were entered and it was ordered that the product be destroyed.

584. Adulteration of frozen skinless pollack fillets. U. S. v. 15 Boxes of Fish Fillets. Default decree of condemnation and destruction. (F. D. C. No. 1393. Sample No. 80315-D.)

Examination showed the presence of decomposed fish.

On January 26, 1940, the United States attorney for the Southern District of Indiana filed a libel against 15 boxes of fish fillets at Indianapolis, Ind., alleging that the article had been shipped in interstate commerce on or about December 12, 1939, by Genoa Fisheries, Inc., from Boston, Mass.; and charging that it was adulterated in that it consisted wholly or in part of a decomposed animal substance.

On April 30, 1940, no claimant having appeared, a decree of condemnation was entered and the product was ordered destroyed.

585. Misbranding of canned salmon. U. S. v. 100 Cartons of Salmon. Consent decree of condemnation. Product ordered released under bond to be relabeled. (F. D. C. No. 848. Sample No. 49000-D.)

This product was labeled to indicate that it was red salmon; whereas it was coho salmon, a different species. The flesh varied in color from very light pink to deep pink but could not properly be described as red.

On October 31, 1939, the United States attorney for the District of Massachusetts filed a libel against 100 cartons of salmon at Cambridge, Mass., alleging